(17)

NO. 90-1038

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone, Petitioner

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation, Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE SIX FORMER SURGEONS GENERAL OF THE UNITED STATES, THE AMERICAN COUNCIL FOR SCIENCE AND HEALTH, AND THE TOBACCO PRODUCTS LIABILITY PROJECT

Richard A. Daynard
Northeastern University
School of Law
400 Huntington Avenue
Boston, MA 02115
(617) 437-2026
Counsel of Record

S. Stephen Rosenfeld
Stern, Shapiro, Rosenfeld
& Weissberg
80 Boylston Street
Suite 910
Boston, MA 02116
(617) 542-0663

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and rules:

Miscellaneous:

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NO. 90-1038

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone, Petitioner

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation, Respondents

---

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE SIX FORMER SURGEONS GENERAL OF THE UNITED STATES, THE AMERICAN COUNCIL FOR SCIENCE AND HEALTH, AND THE TOBACCO PRODUCTS LIABILITY PROJECT

INTEREST OF THE AMICI

Letters from the parties granting consent for this brief have been filed with the Clerk of this Court.

All six living former Surgeons General of the United States join as amici in this brief. Leonard A. Scheele, M.D., served from 1948 to 1956. Leroy E. Burney, M.D., served from 1956 to 1961, and in 1957 became the first Surgeon General to call public attention to the likelihood that cigarette smoking caused lung cancer. William H. Stewart, M.D., served as Surgeon General from 1965-1969. Jesse L. Steinfeld, M.D., served as Surgeon General from 1969 to 1973 and participated in the amendment process in 1969 and 1970 that strengthened the Federal Cigarette Labeling and Advertising Act (the Labeling Act). Julius B. Richmond, M.D., served as Surgeon General and Assistant Secretary of Health from 1977 to 1981, and led executive branch efforts to inform the public of the dangers of smoking, including the publication of the comprehensive Fifteenth Anniversary Surgeon General's Report in 1969. C. Everett Koop, M.D., served as Surgeon General from 1981 to 1989, and was responsible for the Surgeon General's Reports on the relationships between smoking and various cancers, cardiovascular disease, chronic obstructive lung disease, workplace illnesses, and nicotine addiction, as well as the comprehensive 1989 report, titled Reducing the Health Consequences of Smoking: 25 Years of Progress.

Each of these former Surgeons General has dedicated his professional life to improving the public health in the United States. Each has recognized the

enormous damage that cigarette smoking has done to the health of millions of citizens, as the leading preventable cause of death and disease in the United States. In the opinion of the amici, reversal of the Court of Appeals decision preempting the cigarette manufacturers' common law obligations to tell the truth about their products will make a significant contribution to the public health.

The amicus American Council on Science and Health (ACSH) is a public health education advocacy group dedicated to providing Americans with sound, scientific data to enable them to separate real from hypothetical risks. ACSH is directed and advised by 200 American and Canadian scientists and physicians. ACSH has, since its founding in 1978, given first priority to clarifying the role of cigarette smoking as the leading preventable cause of death and disease in the United States. ACSH joins this brief because it believes that the legal immunity conferred by the lower court has permitted cigarette manufacturers to continue to confuse the American public about the risks of cigarette smoking, undermining informed choice.

The amicus Tobacco Products Liability Project was established in 1984 by a group of doctors, attorneys, and academics, to engage in advocacy seeking to subject the tobacco industry to the same obligations to consumers and the public as other American industries. The Project, which is part of the nonprofit organization Clean Indoor Air Educational Foundation, has submitted amicus briefs in the First, Third, Sixth and Eleventh Circuit Courts of Appeal on the preemption question presented here.

STATEMENT OF THE CASE

This is a state common law tort action brought in federal district court pursuant to its diversity jurisdiction. The plaintiff's claims are for personal injury and wrongful death caused by decades of smoking cigarette products manufactured by the respondents. Early in the litigation the respondents raised as a defense the argument that the plaintiff's claims were preempted by the Labeling Act, 15 U.S.C. sec. 1331 et seq. Essentially, the cigarette manufacturers argued that claims based on their failure to warn smokers and the public of the serious dangers of smoking, and claims that they engaged in false and misleading practices, could not be heard on the merits because Congress, in passing an act to mandate warning labels on cigarette packages, had precluded such claims. The district court ruled against the respondents but was reversed after the issue was certified for interlocutory appeal to the Third Circuit Court of Appeals. A petition for certiorari from that interlocutory decision was denied, and the case proceeded through discovery and trial on claims arising prior to passage of the Labeling Act.

The jury reached a verdict granting recovery on certain claims, denying recovery on others. On appeal the Third Circuit affirmed the sweeping reading of its preemption decision by the district court, which had held that it covered intentional tort claims as well as claims of negligence.

SUMMARY OF ARGUMENT

This brief will not repeat the arguments presented by the petitioners and the other amici regarding the doctrine of preemption as expounded by the Supreme Court, or the meaning of the Labeling Act as revealed by its language, structure, and legislative history. Rather, since it is the state common law of products liability that will either survive or fall under the disposition of this case, the amici believe it is essential for the Court to fix its attention on the nature of that state law, to determine whether in practical fact it poses a threat to either the purpose or the operation of federal law. The respondents have attacked the common law duty to warn, but they have not taken care to explain it. Since the overriding goal of the amici, as stated in the Interests section, supra, has been to open up the channels of communication so that consumers and would-be consumers across this country can come to understand fully the serious dangers associated with cigarette smoking, the amici believe it is vital that the duty to warn be preserved in the area of cigarette products. In the view of the amici, the cigarette manufacturers' acceptance of their responsibility under the common law is our best hope for ensuring that the dangers of cigarette use are finally brought home to the American public.

The duty to warn is neither in actual conflict with the Labeling Act, nor does it threaten to undermine its regulatory design. The decisions of state courts make clear that cigarette manufacturers have means available to provide an adequate warning about the serious and often life-threatening risks of smoking that are not in conflict

with the Labeling Act. In fact, the respondents and other cigarette manufacturers have over the years utilized all the methods recognized by the common law for communicating information about products, but rather than deliver warnings, they have used these methods to challenge the significance of scientific data documenting the risks of smoking. The same techniques would also be available for satisfying the cigarette manufacturers' duty to warn.

In truth, the respondents have been counting on preemption to shield them from the continuing and dynamic obligation borne by every other manufacturer in America in products liability cases, to keep abreast of evolving knowledge about their products and share new knowledge about risks with consumers. That shield does not serve the goals of the Labeling Act, it mocks them.

In like manner the respondents seek to turn the Labeling Act on its head, arguing that its reference to cigarette "advertising or promotion" goes so far as to protect them from accountability under the common law duty to warn even when they use advertising and promotion to undermine the impact of the cigarette warning label. They argue, in essence, that the Congress engaged in sabotage of its own legislative goal of advancing public health by immunizing even their intentional efforts to mislead the public about the risks of cigarette smoking from state suits for compensation. This Court has given such arguments short shrift in the past; it should do so here.

ARGUMENT

THE COMMON LAW DUTY TO PROVIDE AN ADEQUATE WARNING REQUIRES ONLY THAT CIGARETTE MANUFACTURERS FIND WAYS TO COMMUNICATE THE TRUTH ABOUT THEIR PRODUCT, AND WAYS ARE AVAILABLE FOR COMMUNICATING THE TRUTH THAT DO NOT CONFLICT WITH FEDERAL LAW.

A. This Is Not A Case About Conflicting Label Requirements, Because The Common Law Of Products Liability Imposes On Manufacturers A Duty To Warn, Not A Duty To Label, And That Duty To Warn Can Be Met In Various Ways Without Undermining The Federal Labeling Requirements.

A fundamental principle of preemption holds that state law which does not conflict directly and irreconcilably with federal law should be permitted to stand. Accordingly, preemption analysis demands that the Court scrutinize not only the Act of Congress for which supremacy is claimed, but the state law that is targeted for execution.[1/]

[1/]The purpose of dual interpretation of state and federal law is to find a way, if one is legitimately available, to avoid unnecessary state-federal friction, by permitting a local law which does not conflict directly and

Moreover, the respect that our system of federalism pays to state and local law counsels that the Court demand more than the Third Circuit's superficial portrayal.[2/]

---

irreconcilably with federal law to stand. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) (in determining whether federal securities regulation preempts local regulation, "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted").

[2/]It should not escape the Court's notice that the Third Circuit's holding on preemption contained no analysis of the operation of state law whatsoever. Its entire examination of the issue was as follows:

> Having identified the purposes of the [Labeling and Advertising] Act, we now must evaluate the effect of the operation of state common law claims on these purposes. In so doing, we accept the appellants' assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." As the appellants point out, several Supreme Court opinions reflect recognition of the regulatory effect of state law damage claims and their potential for frustrating congressional objectives.

Common law, in particular, is the bedrock of local law, and although it is subject to preemption, the respondents must shoulder the heavy burden of showing that the nature and operation of the common law of products liability is such that a head-on collision between the Labeling Act and the common law will inevitably occur if the two systems are permitted to coexist. The respondents have made no such showing, nor can they, because the law of New Jersey -- in harmony with the common law of products liability generally -- is sufficiently broad-gauged and flexible to permit it to fulfill its role without interfering with the purpose or operation of the federal law in any way.

The role of products liability law at one level is to

> Applying this principle, we conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertising, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (1986) cert. denied 479 U.S. 1043 (1987) (citations and footnote omitted).

The bold act of displacing the state's common law deserved far more by way of analysis than this ipse dixit approach.

compensate. When the salutary, interdependent relation between manufacturer and consumer has broken down, and injury that was avoidable has occurred because the manufacturer has failed in its responsibility for communicating about the dangers of its product and how to avoid them, the common law requires compensation. At a more fundamental level, however, it is clear that the root of the duty to warn is not the compensation itself, but the manufacturer's unfairness in not sharing information, and thereby imposing risks on the consumer of which the consumer is unaware. The premise of this branch of the common law is that, in the case of a prudent consumer, adequate warnings prevent injuries, and in the case of consumers who do not take adequate warnings to heart, their own lack of prudence precludes a right to recover.[3/]

Because the principle of effective information-sharing behind the duty to warn is result-oriented, the common law relies not on rigid formulae or abstract doctrines; there is no preordained type of communication that automatically passes or fails the liability test. It is not

---

[3/]See, e.g., Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984) ("There is a presumption that an adequate warning would be heeded. This operates to the benefit of the drug manufacturer [of oral contraceptives] where adequate warnings are in fact given, but where warnings are inadequate, the presumption is in essence a presumption of causation"). See also Keeton, "Products Liability--Problems Pertaining to Proof of Negligence," 19 Sw. L.J. 26, 34 (1965).

a common law of labels, or of public service announcements, or of warning brochures, or package inserts, or instruction manuals. All these methodologies have a potential role, and the manufacturer has wide latitude in determining how to warn and thereby to avoid liability. If the warning is accurate, clear and unambiguous,[4/] if it is sufficiently intense in language to communicate the gravity of the risks involved in the use of the product,[5/] if it is complete and unclouded by

---

[4/]"[W]e recognize that the function of language is not only to express ideas accurately, but to communicate them effectively. The touchstone must be the impression created by the directions or warnings on the average reasonable consumer." D'Arienzo v. Clairol, Inc., 125 N.J. Super. 224, 310 A.2d 106 (1973); Felix v. Hoffman-LaRoche, Inc., 540 So.2d 102 (Fla. 1989) (adequacy of warnings regarding side effects of prescription drugs can become a question of law and taken from the jury if the warning is "accurate, clear, and unambiguous"). For a thorough and up to date treatment of the duty to warn and its ramifications, see Wrubel, "Liability for Failure to Warn or Instruct," Pract. Law Inst. Litigation and Administrative Practice Course Handbook Series: Litigation (1989).

[5/]See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1104 (5th Cir. 1973) (Texas law) (warnings failed to intimate the dangers of fatal illness caused by asbestosis and mesothelioma. The words "may be harmful" held to convey "no idea of the extent of the danger").

contradictory messages,[6] and as long as the methods chosen are likely to find their way to those who need the warning,[7] the duty to warn is satisfied.[8]

---

[6]See part C, infra.

[7]See, e.g., Broussard v. Continental Oil Co., 433 So. 2d 354 (La. Ct. App. 1983) (single warning label referring consumer to owner's manual was adequate given the number and complexities of specific warnings); Wrubel, op. cit. n. 4, at 27.

[8]See, e.g., Wyeth Laboratories, Inc. v. Fortenberry, 530 So.2d 688 (Miss. 1988) (en banc) (package insert warning physicians of possible adverse reactions to non-swine flu vaccine found adequate as matter of law); Humes v. Clinton, 286 Kan. 590, 792 P.2d 1032 (1990) (warning brochure satisfies manufacturer's warning obligation in case of injury caused by IUD); Erickson v. American Honda Motor Co., 455 N.W.2d 74 (Minn. Ct. App. 1990) (rev. den 1990) (video and brochure to warn prospective buyers of all terrain vehicles of the dangers; verdict for plaintiff on other grounds); East Penn Mfg. Co. v. Pineda, 578 A.2d 1113 (D.C. Ct. App. 1990) (pamphlet and manual provide adequate warning of risks in recharging battery); Firestone Tire & Rubber Co. v. Battle, 745 S.W.2d 909 (Tex. Ct. App. 1988) (In upholding verdict for plaintiff, court cites manufacturer's failure to warn in the face of recommendation from safety expert that pamphlet be widely disseminated in order to reduce or eliminate "spin-break' accidents from hidden defect in

The cigarette manufacturers are, in fact, well-versed in finding diverse ways to deliver their own peculiar health message to consumers. For example, they provide a toll-free telephone number for journalists to call to obtain comments from "the other side" when news stories break about the hazards of smoking.[9] They offer trained spokespersons to appear on national and local radio and television programs to defend against reports on smoking risks.[10] They give press conferences to coincide with the release of the Surgeon General's Reports, in order to rebut the health assertions contained in these

---

tires); Cobb v. Syntex Laboratories, 444 So.2d 203, 205 (La. Ct. App. 1983) (manufacturer not liable because patient received manufacturer's pamphlet from physician specifically warning of risk of stroke from birth control pills).

The use of more than one method for warning consumers of the risks associated with the product can provide strong evidence of an adequate effort to warn. See, e.g., Rivers v. Am. Tel. & Tel. Technologies, et al, 147 Misc.2d 366, 554 N.Y.S. 2d 401 (Sup. Ct. 1990) (manufacturer's effort to warn every link in the chain of distribution of chemical, with label on barrels, package inserts for physicians, and instruction manuals preclude liability on a failure to warn theory).

[9]See, e.g., Broadcasting, April 18, 1983, at 9.

[10]Id.

reports.[11] They have even run full-page newspaper and magazine advertisements dedicated entirely to disputing public health findings.[12] Significantly, they apparently have not considered these advertisements to come within the ambit of the Labeling Act, since they have not put the Surgeon General's warnings on them. These same methods would be as effective in warning about the dangers of smoking as they have been in disputing them.[13]

Thus, under these prevailing principles of the common law, the federally mandated label may be left completely intact. If to avoid liability the respondents have a responsibility to communicate the knowledge they possess of the dangers of smoking, they also have a variety of means available to them, and the operation of tort law in trials in state court will not interfere with the purpose or operation of the federal act.[14] The federal labeling requirements will not be tampered with; rather, an examination will be made whether the state of knowledge about smoking risks obligated the respondents and other cigarette manufacturers to use one or more of the other available means of communication to warn the plaintiff of dangers not covered by the label. Far from undermining the purpose of the federal law, Congress' primary goal of "adequately inform[ing the public] about any adverse health effects of cigarette smoking"[15] is best served by permitting the state law to function in precisely the fashion that it has evolved in the products liability area, making information-sharing between manufacturer and consumer the essential price by which freedom from this type of tort liability is purchased.

---

[11] See, e.g., New York Times, January 12, 1979, at 1, 11.

[12] These advertisements appear as exhibits in the Federal Trade Commission opinion in In the Matter of R.J. Reynolds Tobacco Co., Dkt. 9206, 5 CCH Trade Regulation Reporter para. 22,522 at 22,197-22,215 (1988).

[13] Another common method for warning of health risks, package inserts, has been employed by one cigarette manufacturer. See package insert, appended to this brief, which R.J. Reynolds Tobacco Co. included inside every pack of Premier cigarettes.

[14] Even if a direct conflict between state and federal law were somehow to arise in the course of a trial, then "preemption...is limited to a holding that the specific issue decided by the jury imposing liability on [the manufacturer] was preempted as a result of direct conflict between our state's decisional law and the [federal law]." Feldman v. Lederle Laboratories, 234 N.J. Super. 559, 561 A.2d 288, 296 (1989) (in case where duty to warn imposed obligation in conflict with explicit FDA regulations, the duty to warn remains operative, but the particular claim is precluded by the Supremacy Clause).

[15] 15 U.S.C. sec. 1331.

B. By Mischaracterizing Their Duty Under The Common Law, The Cigarette Manufacturers Seek To Shield Themselves From The Dynamic And Continuing Obligation Borne By Every Other Manufacturer In America In Products Liability Cases, To Keep Abreast Of Evolving Knowledge About Their Products And Share New Knowledge About Risks With Consumers.

The manufacturer's duty to warn consumers under state law contains a corollary, continuing duty to search for knowledge about its products that would tend to reveal hidden risks. In contrast, the duty to warn as the respondents would frame it, limited to the four corners of the federal act and its narrow labeling requirement, is frozen in time. Regardless of how significantly knowledge about the dangers of cigarette smoking has advanced, the respondents may turn a blind eye, at least until the periodic Congressional tug of war produces a different requirement, at which point a new frozen-in-time warning requirement replaces the old.

If the respondents' version of preemption succeeds, the important incentive for manufacturer vigilance fostered by the duty to warn will not apply. If, however, the shield of preemption is unavailable to them, the cigarette manufacturers will for the first time be encouraged to recognize that they bear the same continuing responsibility to inform the public fully about the risks of their products as is borne by every other manufacturer in America. See, e.g., Gingold v. AUDI-NSU Auto Union, 389 Pa. Super. 328, 567 A.2d 312, 329 (1989) (child auto restraints: "The specter of damage actions may provide manufacturers with

added dynamic incentives to continue to keep abreast of all possible injuries stemming from the use of their product so as to forestall such actions through product improvement," quoting from Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984)); Barry v. Don Hall Laboratories, 56 Or. App. 518, 642 P.2d 685, 689 (1982) (vitamins: "The duty is to keep abreast of research and knowledge...in its field and to warn of 'all reasonable dangers which the manufacturer knows or should know concerning the product in its use by the purchaser'").[16/]

[16/]The products that have undergone scrutiny under the continuing duty to "keep abreast" of research and knowledge are amazingly diverse. See, e.g., Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972) (air conditioners); LaPlant v. E.I. DuPont De Newours and Co., 346 S.W.2d 231 (Mo. Ct. App. 1961) (chemical weed-killer); Westinghouse Elec. Corp. v. Nutt, 407 A.2d 606 (D.C. 1979)(elevators); Whitacre v. Halo Optical Products, Inc., 501 So.2d 994 (La. Ct. App. 1987)(safety goggles); Monsanto Co. v. Miller, 455 N.E.2d 392 (Ind. Ct. App. 1983)(silo coating material); Manietta v. International Harvester Co., 496 A.2d 286 (Me. 1985) (dump trucks); Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (tetracycline); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984) (oral contraceptive); Antley v. Yamaha Motor Corp., 539 So.2d 696 (La. Ct. App. 1989) (all-terrain vehicles); Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984) (hormone drug); Strain v. Mitchell Manufacturing Co., 534 So.2d 1385

C. It Is True That The Duty Under State Law To Provide Accurate Information To Consumers Would Jeopardize The Efforts Of Cigarette Manufacturers To Negate The Message Of The Mandated Warning Labels, But Nothing In The Federal Act Or The Doctrine Of Preemption Supports The Attempts Of The Cigarette Manufacturers To Escape Accountability For Such Conduct In Product Liability Cases.

The common law obligation of the manufacturer of a dangerous product is not limited to telling its customers and potential customers the truth about the nature and extent of the hazards of its product: it must also tell the whole truth and nothing but the truth. RESTATEMENT 2D TORTS, §527 and §529 (the whole truth), §402B and §557A (nothing but the truth). The obligation is violated where the manufacturer uses studied ambiguities, half-truths, and false impressions in an effort to maintain sales while pretending to tell the truth. Thus, "overpromotion" of a product may vitiate an otherwise valid warning.[17/]

(La. Ct. App. 1988, writ den. 1989) (collapsible school lunch tables); and George v. Celotex, 914 F.2d 26 (2d Cir. 1990) (asbestos).

[17/]"Action designed to stimulate the use of a potentially dangerous product must be considered in testing the adequacy of a warning as to when and how the product should not be used." Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 220 (1971).

Cigarette manufacturers have used misleading words and visual imagery in a frequently successful effort to confuse children and teenagers who are contemplating smoking about the reality, nature, and extent of the dangers, as well as to provide addicted smokers with rationalizations for not quitting. In this way the manufacturers negate the warning label and other information about the risks of smoking. The evidence presented by the plaintiff on this subject was summarized by the trial court below as follows:

> Evidence presented by the plaintiff, particularly that contained in documents of the defendants themselves, indicates the development of a public relations strategy aimed at combating the mounting adverse scientific reports regarding the dangers of smoking. The evidence indicates further that the industry of which these defendants were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community and, at the same time, to confuse and mislead the consuming public in an effort to encourage existing smokers to continue and new persons to commence smoking. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487,

1490 (D.N.J. 1988); see generally id. at 1490 - 1493.

Although most of the evidence at trial perforce concerned the respondents' pre-1966 conduct, there is ample evidence, both in the trial record below and in the public record, that their efforts to undermine the government's public health education campaign have continued unabated. Thus, the Tobacco Institute, the industry's designated public relations and lobbying representative, continued to run advertisements such as the one, which ran in newspapers on December 1, 1970, headlined "After millions of dollars and over 20 years of research: The question about smoking and health is still a question." (P-2920, J.A. 42). The pretextual nature of this continuing "research" is documented in a 1974 Lorillard memorandum: "Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc." (P-939, J.A. 60). The techniques used by the industry to undermine public understanding of the dangers of their products included "creating doubt about the health charge without actually denying it" (P-1105, J.A. 51), and "attacking researchers themselves, where vulnerable" (P-2745, J.A. 70).

A dramatic application of the industry's strategy is the series of full-page advertisements which the R.J. Reynolds Tobacco Company ran in newspapers and

magazines in 1984 and 1985.[18] The first of the series asked for "an open debate about smoking," asserting that "[s]tudies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary." (P-2935; J.A. 72).[19] Another one, entitled "Of cigarettes and science," asserted that the belief that smoking causes heart disease "is an opinion. A judgment. But not scientific fact".[20] Several other advertisements contain the assertion that "there is little evidence -- and certainly nothing which proves scientifically -- that cigarette smoke causes disease in non-smokers."[21]

---

[18] See n. 12, supra.

[19] Id.

[20] This advertisement was the subject of a 1986 FTC complaint, which resulted in a May 22, 1989 consent judgment in which the respondent agreed, inter alia, to refrain from "[m]isrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between cigarette smoking and chronic or acute health..." In the Matter of R.J. Reynolds Tobacco Co., Dkt. 9206.

[21] Exhibits 2-D, 2-F, and 2-G, 5 CCH Trade Regulation Reporter para. 22,522, at 22,201, 22,203, and 22,204. The Federal Court of Australia found, in an exhaustive 210-page opinion issued on February 7, 1991,

The Federal Trade Commission concluded in its 1967 report to Congress pursuant to sec. 1337 of the Labeling Act that "[t]here is virtually no evidence that the warning statement on cigarette packages has had any effect," and that part of the reason may be that "[c]igarette advertising continues to promote the idea that cigarette smoking is both pleasurable and harmless." The FTC's 1969 report concluded that "current cigarette advertising leaves the impression that cigarette smoking is a healthy activity and one whose risk, to the extent that it exists, can be reduced through the presence of a filter." See Senate Report (Commerce Committee) No. 91-566, Dec. 5, 1969 [To accompany H.R. 6543], 1970 U.S. Code Cong. & Adm. News 2655 - 2657 (quoting both FTC reports).

Twenty years later, nothing fundamental had changed:

---

in Australian Federation of Consumer Organizations Inc. v. Tobacco Institute of Australia (New South Wales, No. G 253 of 1987) that the identical statement made in Australian newspaper advertisements in 1986 was incorrect, and that if the industry was permitted to repeat this assertion, "Active smokers are likely to be misled or deceived by the statement into believing that their smoking does not prejudice the health of non-smokers. Non-smokers are likely to be deceived or misled by the statement that cigarette smoke does not affect their own health or the health of their children. These are serious matters." Id. at 209.

> Despite the fact that cigarette warning labels have been required since 1966, there are few data about their effectiveness in meeting any objective... [T]here is empirical evidence that the public did not pay much attention to the pre-1985 labels in advertisements... These findings are consistent with analyses of the visual imagery of tobacco advertising, which note that the structures of the ads draw consumers' attention away from the warnings contained in the ads. It has also been argued that the sheer volume of cigarette advertising, all applying the basic themes of product satisfaction, positive image associations, and risk minimization, overwhelm the in-advertisement warnings. U.S. Dep't of Health and Human Serv., Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General, at 478 - 477 (1989)(references omitted).

Such conduct, if proved, violates the respondents' duty to warn. It is not, as the respondents' have argued, protected by the Labeling Act. The principal purpose of the Federal Cigarette Labeling and Advertising Act is to increase the information available to consumers about the true relationship between smoking and health. Banzhaf v. Federal v. Communications Comm'n, 405 F.2d 1082 (D.C. Cir. 1968). The use by cigarette companies of studied ambiguities, half-truths, or false impressions to describe this relationship subverts this purpose. Even if it

were possible to read the words of 15 U.S.C. §1334(b) so expansively as to protect the manufacturers against common law claims for misrepresentation, fraud, and conspiracy based on deceptive health claims, such an extreme reading would serve only to undermine Congress' principal purpose of advancing public health. This Court has rejected much more solidly based statutory readings, where the effect would be to provide "a ready means by which...the wrongs which the statute was intended to remedy could be successfully inflicted." Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); see Johnson v. Southern Pacific Co., 196 U.S. 1, 14, 18 (1904).

It is hard to see how the methods of communication that have been employed to undermine the impact of the warning label mandated by the Labeling Act should be protected, while the state's common law that contemplates the use of these methods to reinforce the warning label and ensure that Congress' message gets through should be preempted. This is the essence of the respondents' perverse argument, and it deserves rejection.

D. If The Cigarette Manufacturers Are Held To The Same Legal Standards As The Manufacturers Of Other Dangerous Products, Potentially Life-saving Information Will Flow To Addicted Adults, As Well As To Teenagers And Children Who Are Contemplating Smoking, About The Specific Illnesses Associated With Cigarettes And The Probability Of Illness And Death.

If cigarette manufacturers are not held to enjoy a

special federal immunity from state law torts standards, they will have to find means to communicate, effectively and unambiguously, to their customers and potential customers, the nature and extent of the hazards of using their products. Although there may be limits to the potential effectiveness of public education in reducing cigarette usage, these limits are not being reached, largely because the cigarette companies have not met their responsibility to support and enhance this effort, but instead have worked to undermine it.

Among the types of information to which consumers are entitled are the specific fatal, disabling, or addictive diseases and conditions which the products can cause,[22/] and the likelihood that a person using the product will contract one of these afflictions.[23/] In the case of cigarettes, the manufacturers are responsible for

---

[22/]See, e.g., MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, cert. denied 474 U.S. 920 (1985)(disabling stroke), Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974) (addiction to prescription drug).

[23/]See MacDonald v. Ortho Pharmaceutical Corp., n. 22, supra, 475 N.E.2d at 70: "Thus, the manufacturer's duty is to provide to the consumer written warnings conveying reasonable notice of the nature, gravity, and likelihood of known or knowable side effects."

informing consumers that smoking causes many forms of cancer, as well as heart attacks, strokes, arterial diseases, emphysema and chronic bronchitis, that it is highly addictive, and that it causes severe harm to fetuses, young children, and others inadvertently exposed to the toxins and carcinogens in cigarette smoke.[24/] While most Americans today know about most of these dangers:

> [S]ubstantial numbers of smokers are still unaware of or do not accept important health risks of smoking. For example, the proportions of smokers in 1986 who did not believe that smoking increases the risk of developing lung cancer, heart disease, chronic bronchitis, and emphysema were 15 percent, 29 percent, 27 percent, and 15 percent, respectively. These percentages correspond to between 8 and 15 million adult smokers in the United States.[25/]

Equally important, cigarette companies are obliged to inform consumers not only about the nature of the dangers posed by their products, but about the extent of

---

[24/]See, e.g., U.S. Dep't of Health and Human Serv., Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General (1989) at 98 - 99.

[25/]Id. at 244.

these dangers as well. For consumers to be able to make a reasoned choice whether to smoke, they must understand both the absolute risks to themselves of smoking,[26/] and how these risks compare to other risks they encounter in daily life.

> [M]ost adults underestimate the impact of smoking on longevity, according to a 1980 Roper survey. In this survey, 30 percent of the population and 41 percent of smokers did not know that a typical 30-year-old smoker shortened his life expectancy at all by smoking. Among those who did know that smoking reduces one's life expectancy, many underestimated the degree to which this is true.[27/]

As consumers obtain more complete and accurate information about the dangers of smoking, cigarette

---

[26/]"Absolute risks can be described by the proportion of those exposed to a given factor who will actually die or develop the particular condition, or by the reduction of life expectancy caused by exposure. As many as one-third of heavy smokers aged 35 years will die before age 85 of diseases caused by their smoking, and 30-year-old smokers will shorten their lives an average of 6 to 8 years if they smoke a pack a day." Id. at 206 (references omitted).

[27/]Id. at 206

consumption -- along with its associated morbidity and mortality -- declines. Thus, the 1989 Surgeon General's Report estimated that, "By 1987, adult per capita cigarette consumption would have exceeded its actual level by an estimated 79 to 89 percent had the antismoking campaign never occurred."[28/]

These public health gains have all been achieved in the face of the cigarette companies' best efforts to muddy the waters. Youngsters experimenting with cigarettes, and smokers thinking about quitting, are encouraged to avoid confronting the unpleasant truths about the health effects of smoking. Smoking has not been proven to cause lung cancer or other diseases, insists the cigarette industry, and the Surgeon General and other public health authorities are simply mistaken in thinking that it has. See section C, supra.

Thus, while it is not possible to quantify in advance the public health benefits -- in terms of reduced

---

[28/]Id. at 661 - 662. As a result of the decreased consumption caused by the antismoking campaign, "an estimated 789,000 deaths were postponed during the period 1964 through 1985", where "[t]he average life expectancy gained per postponed death was 21 years", and "[c]ampaign-induced quitting and noninitiation through 1985 will result in the postponement or avoidance of an estimated 2.1 million smoking-related deaths between 1986 and the year 2000." Id.

consumption, morbidity and mortality -- from holding cigarette companies to the same common law consequences as other manufacturers, they plainly will be substantial.

CONCLUSION

The judgment of the court of appeals upholding the respondents' claim of preemption should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

S. Stephen Rosenfeld
Stern, Shapiro, Rosenfeld
& Weissberg
80 Boylston Street
Suite 910
Boston MA 02116
(617) 542-0663

Richard A. Daynard
Northeastern University
School of Law
400 Huntington Avenue
Boston MA 02115
(617) 437-2026

Attorneys for the Amici
Six Former United States
Surgeons General, the
American Council on
Science and Health, and
the Tobacco Products
Liability Project

APPENDIX

How To Fully Enjoy The Cleaner Smoke

• For best results, we recommend using a good quality butane lighter like the disposable Scripto ELECTRA™ XL. Matches and other lighters can be used but may cause the filter to appear gray due to impurities in the flame. Car lighters do not work.
• Hold the flame to Premier a second or two longer than you normally would, until an ash begins to form.
• Since the tobacco doesn't burn, Premier does not burn down. Yet it smokes just as long as other king-size cigarettes.

Introducing Premier

The Cleaner Smoke

COVER

The Cleaner Smoke Experience

Premier is the remarkable breakthrough that ushers in a whole new era of smoking enjoyment — *cleaner* enjoyment than you may have ever thought possible. We're confident that you will appreciate the cleaner taste, the cleaner aroma, the cleaner feel of new Premier. Enjoy Premier for a week and discover the new pleasure of cleaner smoking.

0.4 mg. nicotine av. per cigarette by FTC method.

What is "Cleaner Smoke"?

Premier is the first cigarette you smoke by ***heating tobacco — not burning it.***

It's a breakthrough that changes the very composition of cigarette smoke — substantially reducing many of the controversial compounds found in the smoke of tobacco-burning cigarettes. Those that remain include carbon monoxide, but the amount of carbon monoxide is no greater than in the best-selling "lights."

What it all comes down to is a cleaner smoke — for you and everyone around you.

Important Information About New Premier

• Do not smoke a bent, crushed or damaged Premier. A Premier cigarette that has been damaged, particularly at the lighting end, will not smoke properly and could result in a hot ember falling out and burning something. Please return damaged packs to us for free replacement.
• As with any cigarette, avoid contacting the lit end with anything that will burn.
• You will know your Premier is out when it is no longer warm and you no longer get smoke. Be sure it is out before discarding and please dispose of properly.

INSIDE

PACKAGE INSERT

TWO FOLDS